314 U.S. 631

Office - Supreme Court, U.
FILED
MAY 31 1941
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1093 114

HENRY A. B. DUNNING,
*Petitioner,*

*vs.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

VERNON COOK,
GEORGE ROSS VEAZEY,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

# INDEX.

## SUBJECT INDEX.


PAGE.

Petition for Writ of Certiorari ..... 1

Statement of the Matter Involved ..... 1

Revenue Act of 1934, Section 166 ..... 3

Jurisdiction ..... 4

Questions Presented ..... 4

Reasons Relied on for Allowance of the Writ ..... 4

Brief in Support of Petition ..... 9

Opinions below ..... 9

Jurisdiction ..... 9

Statement of the Case ..... 9

Specification of Errors ..... 10

Summary of Argument ..... 10

Argument ..... 11

Point 1. The decision of the lower Court is in direct conflict with Helvering v. Wood, 309 U. S. 344 ..... 11

Point 2. Section 166, as construed by the lower Court, levies a tax on Mr. Dunning measured by the income of Mrs. Dunning, but Due Process prohibits Congress from stamping her income as his to render it taxable against him ..... 21

TABLE OF CASES CITED.

PAGE.

Blair v. Commissioner, 300 U. S. 5 ..... 24

Burnet v. Wells, 289 U. S. 670 ..... 23, 24, 25

Commissioner v. Branch, 114 Fed. (2d) 985 ..... 19

Commissioner v. Richter, 114 F2 452 (CCA3) See also Hormel v. Richter, 85 L. ed. 651 ..... 20

Corliss v. Bowers, 281 U. S. 376 ..... 22

Corning, Warren H. v. Commissioner (CCA 6th), 104 Fed. (2d) 329; 36 B. T. A. 301 ..... 16, 17

Curry v. McCanless, 307 U. S. 357 ..... 15

Douglas v. Willcuts, 296 U. S. 1 ..... 6

Dunning v. Commissioner (CCA 4th),

(1933 income case) 36 B. T. A. 1222 (Opinion Dec. 31, 1937) ..... 7, 19, 24

(1934 income case) 41 B. T. A. 1101 (Opinion May 10, 1940) ..... 19, 23

(CCA 4th) 118 Fed. (2d) 341 (March 10, 1941) 4, 5, 6, 7, 9, 15, 27

DuPont v. Commissioner, 289 U. S. 685 ..... 10, 18, 23

Heiner v. Donnan, 285 U. S. 312 ..... 25

Helvering v. Achelis (CCA 2nd), 112 Fed. (2d) 929 ..... 20

Helvering v. Clifford, 309 U. S. 331; 38 B. T. A. 1532; 105 Fed. (2d) 586 ..... 18, 20

Helvering v. Fuller, 310 U. S. 69 ..... 20

Helvering v. Hallock, 309 U. S. 106 ..... 18, 26, 27

Helvering v. Horst, 85 L. ed. 99 (U. S. Supreme Court) ..... 24

Helvering v. Wood, 309 U. S. 344 ..... 4, 10, 11-14, 26, 27

Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206 ..... 22, 23, 24, 25

Hormel v. Helvering, 85 L. ed. 651 ..... 18

Hormel v. Richter, 85 L. ed. 656 ..... 18

Kraft v. Commissioner (CCA 3rd), 111 Fed. (2d) 370 ..... 14

PAGE.
Lewis v. White (Dist. Ct. Mass.), 56 Fed. (2d) 390.... 21
McArthur v. Scott, 113 U. S. 340..... 15
Reinecke v. Smith, 289 U. S. 172..... 23, 24
Shanley v. Bowers (CCA 7th), 81 Fed. (2d) 13..... 6
United States v. First National Bank of Birmingham (CCA 1st), 74 Fed. (2d) 360..... 12, 15
United States v. Field, 225 U. S. 257..... 16
White v. Poor, 296 U. S. 98..... 16

TEXTS.

Blackstone, Comm., Vol. 2, 121..... 15
Tiffany, Real Property, 2d edition, Sec. 129 et seq.; 316 et seq. ..... 13
Vol. I, Sec. 130 ..... 20

STATUTES CITED.

Revenue Act of 1924, Sec. 219..... 21
Revenue Act of 1934,
Sec. 22(a) ..... 20
Sec. 166 ..... 3, 4, 18, 20, 21, 24, 25

Reproduced at page 3

# Supreme Court of the United States

OCTOBER TERM, 1941.

---

No.....

---

HENRY A. B. DUNNING,
*Petitioner,*

*vs.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

---

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

## I.

## STATEMENT OF THE MATTER INVOLVED.

Henry A. B. Dunning, the Petitioner, created by deeds of May 31, 1932 five trusts, irrevocable in all respects until January 10, 1937, when the trusts would terminate

if the grantor then declared that he desired no extension. The Maryland Trust Company and Henry A. B. Dunning, Trustees, were directed, in each trust, to pay first, $10,000 out of the income to Ethel Adams Dunning, wife of the petitioner; surplus income in the discretion of the Petitioner, as Trustee, might be accumulated and reinvested and become part of the corpus of the estate or might be paid under deed No. 1 to Ethel Adams Dunning, wife of Henry A. B. Dunning, under deed No. 2 to J. H. Fitzgerald Dunning, an adult son of Henry A. B. Dunning, under deed No. 3 to Katherine Ellen Dunning, an adult daughter of Henry A. B. Dunning, under deed No. 4 to H. A. Brown Dunning, an adult son of Henry A. B. Dunning and under deed No. 5 to Charles Alexander Dunning, a minor son of Henry A. B. Dunning. The Trustees were given the power to hold and possess, in each trust, 7250 shares of the capital stock of Hynson, Westcott & Dunning, Incorporated, and to receive all dividends thereon. Dunning, Trustee, during his lifetime has full discretionary powers as to the nature and character of investments to be made, including the right to sell and reinvest; he is also given the right to vote the stock placed in trust.*

Under the terms of the deeds of trust the corpus of the estate reverts to Henry A. B. Dunning at the end of the four year and ten months period, but under no possible condition can any part of the current or of the accumulated and reinvested income ever revert to the grantor. There is no restriction whatever as to the use of the income from these trusts by Mrs. Dunning. The fact is that a portion was used to pay insurance premiums

*NOTE—For copy of one of the deeds of trust see R. 39.

and on this petitioner does not dispute liability. The balance was used for miscellaneous purposes at the pleasure of the wife. The income from the trusts for the children was accumulated. Mrs. Dunning included in her return the $50,000 per annum representing the income paid by the trustees to her in the year 1934. Under each of the other four trusts the trustees paid the tax. (R. 46-49, Agreed Statement of Facts.)

On December 29, 1936, Petitioner gave notice that he desired no extension of the date of termination and the trusts therefore terminated on January 10, 1937; the investments representing the accumulated income remained in the hands of the Trustees; the stock representing the original corpus of the estate was returned to the grantor on January 10, 1937. (R. 48-49, Agreed Statement of Facts.)

The Revenue Act of 1934, Section 166 (Title 26, USCA §166, p. 478) is as follows:

"Revocable Trusts.

Where *at any time** the *power* to *revest* in the grantor title to any part of the corpus of the trust *is vested*—

(1) in the grantor, either alone or in conjunction with any person not having a substantial interest in the disposition of such part of the corpus or income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the trust or the income therefrom, then the income of such part of the trust** shall be included in computing the net income of the grantor." [Italics supplied].

---

*NOTE—The prior statute read, "at any time during the taxable year." (Act 1932, Sec. 166).

**NOTE—The prior statute inserted "for such taxable year."

The matter involved is whether the income from the five trusts should or should not be included in the personal income of Henry A. B. Dunning, the Petitioner, for the year 1934.

## II.

## JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals of the Fourth Circuit (entered March 10, 1941) is, under Section 240(a) of the Judicial Code, as amended (28 USCA §347).

## III.

## THE QUESTIONS PRESENTED.

(1) Is not the opinion and decision of the two prevailing judges of the Circuit Court of Appeals in this case in direct conflict with the decision of this court in *Helvering v. Wood*, 309 U. S. 344?

(2) Did Congress intend by the Act of 1934, amending Sec. 166 of the income tax law, to tax A on the income of B and, if so, does Congress have any such power under the Fifth Amendment to the Constitution?

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The lower Court's decision (118 Fed. (2) 341) is in conflict with *Helvering v. Wood*, 309 U. S. 344. It speaks of the distinction in the Wood case between a grantor's reversionary interest and his power to revest or revoke as "based upon fine technicalities" (346).

Although Congress had this very distinction in mind in enacting the 1934 Revenue Act, as was determined by this Court in the Wood case, nevertheless a majority of the lower Court declined to recognize the distinction.

The lower Court's construction of Section 166 taxes to Dunning income which was not his, in 1934, and which could never become his. The statute is thus construed, in effect, to mean that Congress has declared, in a statute headed "Revocable Trusts", that the income of trusts which are irrevocable until a later year is to be taxed to the grantor during all of the period while the trust is irrevocable. Congress has endeavored to exercise no such power. Congress has not attempted to say that, because a trust may be revoked at some future time, the result would be to make the income of that trust taxable during the irrevocable era. The British Parliament has taxed short term trusts*; Congress has not decided that because a trust has a short life of a certain number of years, it thereby is still born.

Following the terms of the statute, Dunning, in 1934, had no effective *"power,"* he was not *"is vested"* with a power, he had no power to *"revest."* The trust had to last for four years and ten months; if Dunning died earlier, the length of life of the trust became tremendously longer; when he indicated in December of 1936 that he did not want the trust to be extended, this did not shorten the predetermined minimum course of the years which the trust had to run. Dunning took Congress at its word when it drew the distinction between *reverter* and *revesting* in the Act of 1932, in force when

*NOTE—Finance Act of 1922, paragraph h, §20.1 (see 78 Law Journal —1934—376, 396), covering trusts "for a period which cannot exceed six years".

these trusts were executed. Congress, in 1934, did not change this principle; it reaffirmed the distinction; the lower Court, of literal mind, merely sees in these trusts the fact that some day they might be brought to an end by the grantor's act, and therefore concludes that this future possibility darkens all the intervening past from 1932 to 1936, inclusive, so as to justify labeling the trusts as revocable during that era. Thus the tail wags the dog. We contend the opposite.

Something was vaguely said by the lower Court about the broad powers of the trustee and about the benefits conferred upon his family. This is a case under Section 166. Mrs. Dunning was not hampered in spending the money received under these trusts.* A man may still make a gift to his wife beyond the support required of him by law. If the wife be thrifty, she may buy insurance on her husband's life for her own benefit; if not so thrifty, she may cultivate gardens, travel, play golf or haunt the bridge tables. This trustee had no power to hold the securities in his own name individually, no power to invade the corpus for the benefit of the cestuis, no power to transfer accumulated corpus or income to himself, and no power to revoke the trust with the consent of his wife or with the consent of any other person; nor had he any power to remove the Maryland Trust Company, his co-trustee, in any possible way. Any issue of this sort was considered by the Board of Tax Appeals in the 1933 case, and the Government acquiesced in the fact found that the income was not tax-

*NOTE—"Certainly a man must be able to make his wife a gift if he wishes without affecting his marital duty. No authority has been cited for the theory that every gift by a husband to his wife must be presumed to be discharged of it. * * *" *Shanley vs. Bowers* (C. C. A. 7) 81 F. (2d) 13, discussing *Douglas v. Willcuts*, 296 U. S. 1, and see R. 49. The deeds did not dedicate the trust income to the purpose of meeting an obligation of the grantor.

able to the grantor on the theory that he retained control over the trust (36 B. T. A. 1222).

In brief, Congress has never taken the step of taxing short term trusts; this trust does not fall under Section 166, for the Court is dealing with a reverter and not with a vested power to revest; if Congress can be said to have intended to tax D on the income of Mrs. D by taxing Mrs. D's income in 1934, when Mr. D had no control of it, could not repossess himself of that income and could not repossess himself of the corpus during the year 1934, then Congress has overstepped the limit of its Constitutional Power.

As was said by Judge Soper, in his dissenting opinion in this case, 118 F. 2d at 346:

> "*Corliss v. Bowers*, 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916, involved a trust in which the tax-payer-grantor 'fully reserved the power at any moment to abolish or change the trust at his will', and thereby retained 'actual command over the property taxed—the actual benefit for which the tax is paid'. Here the income in question for the year 1934 had been irrevocably transferred to the wife, and placed entirely beyond the domination of the taxpayer. If full significance is given to this controlling fact, there is no occasion to indulge in the interesting speculation as to how long the term of a trust, subject to a future power of revocation, must be in order to obtain the protection of the Federal Constitution."

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case num-

bered and entitled on its docket No. 4730, Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, v. Henry A. B. Dunning, Respondent on Review, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

VERNON COOK,

GEORGE ROSS VEAZEY,

Counsel for Petitioner

Dated May 28, 1941.